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In The

Supreme Court of the United States

October Term, 1996

CENTRAL OFFICE TELEPHONE, INC.,

Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October, 1997

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in holding that a trial court does not infringe upon the province of the jury in contravention of the Seventh Amendment to the United States Constitution when it enters judgment as a matter of law reducing a jury award of damages, in lieu of a grant of remittitur or of a new trial, where the jury delivered a general and not a special verdict, such that the trial court resorted to its own intuition as to which portion of the damages were predicated upon evidence which it determined post-trial to have been improperly admitted.

2. Whether the Ninth Circuit Court of Appeals erred in holding that a trial court may enter judgment as a matter of law reducing a jury award of damages based on the trial court's post-trial determination that expert testimony admitted during the trial should have been excluded, where all other circuits that have ruled on this issue have found that in order to prevent unfair reliance and prejudice the only proper procedure is to grant a new trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner **Central Office Telephone, Inc.** respectfully prays that a writ of certiorari issue to review the Opinion of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court Appeals (App. 1-37) is reported at 108 F.3d 981, (9th Cir. 1997). The opinion of the lower court from which the appeal is taken (App. B) is unreported.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was entered on February 26, 1997, *Central Office Telephone, Inc. v. American Telephone and Telegraph Company*, 108 F.3d 981, (CA9 1997) and reprinted as Appendix A hereto. A timely petition for rehearing and suggestion of rehearing en banc was denied on July 18, 1997, the order for which is reprinted as Appendix E hereto.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII, United States Constitution:

> ****[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.****

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner Central Office Telephone, Inc. ("COT"), a reseller of long-distance telecommunication services, appeals the decision of the Ninth Circuit Court of Appeals affirming the District Court's partial grant of judgment as a matter of law in favor of respondent American Telephone and Telegraph ("AT&T"). That grant reduced the jury verdict awarded COT from $13 million to $1.15 million.

Resellers are firms that purchase "bulk" long distance services from carriers and resell them to their own customers. They qualify for volume discount plans by aggregating the business of multiple customers who would not individually qualify for volume discounts. The reseller is the customer of AT&T, as well as its competitor, and the end users are the customers of the reseller.

In the fall of 1989, COT became aware of the opportunity to resell AT&T's "Software Defined Network" ("SDN") service to its customers. SDN is a virtual private network service that allows an AT&T customer, in consideration for a commitment to purchase large volumes of minutes of long distance usage, to receive substantially higher discounts than provided for other available AT&T long distance services.

COT developed a business plan to include the addition of salesmen, telemarketing and expansion into other states, and on October 30, 1989 signed an agreement letter memorializing COT's selection of SDN Expanded Volume Program Plan 2, under which COT would receive a 17 to 20% discount off of basic SDN rates in exchange for a renewable four-year commitment to purchase 2 million minutes annually. COT also selected the SDN Multiple Location Billing Option under which

AT&T would bill up to 6000 of COT's SDN service locations at no extra charge.

When COT began selling SDN services it immediately experienced provisioning delays. Due to these problems, AT&T suggested that COT "park" its customers under a new and different service known as Multi-Location Calling Plan ("MLCP"). Its purpose was to serve COT's customers' long-distance needs until they could be provisioned onto SDN. This service commenced on March 8, 1990.

On April 9, 1990, AT&T informed COT that its first account had been placed onto the SDN. Believing that its SDN was now functional, COT upgraded its SDN subscription to Plan 6, which offered a larger discount (up to 24%) in exchange for a larger volume commitment (15 million minutes annually).

Unbeknownst to COT, on or about March 1, 1990, AT&T, through an Ad Hoc committee formed to "kill" the arbitrage by which resellers conducted their business, initiated multiple strategies to discourage resale.

After COT signed the April 9 contract and continuing until September 30, 1992 when COT canceled its SDN contract with AT&T to avoid going out of business, COT and its customers experienced, among other things, transferred accounts, decreased service, slow or non-existent provisioning of both SDN and MLCP orders, lost orders, limited calling card service, discount misallocation between COT and its customers, incorrect billing, untimely call detail billing, delayed billing, slamming of customers, and increased rates. As of termination date, COT had lost over 75% of its customer base.

COT would have completed its first renewable four-year contract by April 9, 1994, absent AT&T's misconduct, and by date of trial in May of 1994 would have commenced its second

four-year contract. As of trial date, SDN was still AT&T's "flagship" service, utilized by many Fortune 500 companies, and in AT&T's own World Headquarters.

II. PROCEEDINGS BELOW

On June 27, 1994, in the United States District Court for the District of Oregon, a jury entered a verdict finding AT&T liable for willful misconduct in breaching its contract with COT, and intentional interference with COT's contracts with its customers. The jury awarded COT damages against AT&T in the amount of $13 million.

On November 9, 1994, the district court granted in part and denied in part AT&T's motion for judgment as a matter of law. The district court found that COT's evidence with respect to damages was not sufficiently grounded in objectively verifiable facts after 1992, when COT was forced by AT&T's conduct to quit the contract, and reduced the damages award to reflect that decision. The district court determined that the proper amount of damages was $1.154 million

COT appealed the district court's partial grant of judgment as a matter of law on several grounds. COT argued that the grant was improperly executed with respect to the Seventh Amendment of the United States Constitution; that it unfairly prejudiced COT by eliminating, post-trial, evidence which COT had been made to rely upon following its admission at trial; and that it was improper to reduce the jury damages award without offering COT the alternative of a new trial.

On February 26, 1997, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision with regard to its partial grant of AT&T's motion for judgment as a matter of law. The appellate court noted that the United States Supreme Court had previously ruled that judgment

as a matter of law does not, in general, offend the Seventh Amendment right to a jury trial.

REASONS FOR GRANTING THE WRIT

I. A COURT VIOLATES THE SEVENTH AMENDMENT WHEN IT SUPPLANTS A JURY VERDICT ON DAMAGES BY WAY OF JUDGMENT AS A MATTER OF LAW, AND ON THE BASIS OF ITS OWN INTUITIONS.

It is well established (and not questioned here) that judgment as a matter of law, as embodied in Rule 50 of the Federal Rules of Civil Procedure, does not, in general, conflict with the Seventh Amendment of the United States Constitution. *See, e.g., generally, Montgomery Ward & Co. v. Duncan.* 311 U.S. 243 (1940). It is also well established, however, that there are specific situations where judgment as a matter of law is manifestly inappropriate. *See, e.g., Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54-55 (CA3 1989). The present case, substantially similar to *Bereda*, belongs in the latter category. If it is instead ruled to belong in the former category, and the Ninth Circuit Court of Appeals opinion is affirmed, the Seventh Amendment right to a jury trial will be substantially eroded.

Judgment as a matter of law may be entered against a party when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). The necessity for the procedure has been described as follows: "[Judgment as a matter of law] is a device to save time and trouble... [but it is also] something more. It is a method for protecting neutral principles of law from powerful forces outside the scope of law – compassion and prejudice."

Rutherford v. Illinois Central Railroad Company, 278 F.2d 310, 312 (CA5), *reh'g denied*, 276 F.2d 330 (CA5), and *cert. denied*, 364 U.S. 992 (1960). The desirability of these goals and the propriety of a rule which promotes them are not debated herein.

While judgment as a matter of law serves important purposes, however, it must achieve balance with the purposes served by the Seventh Amendment guarantee of the right to a jury trial. *See, e.g., Coates v. Daugherty*, 973 F.2d 290, 293 (CA4 1992) (stating that in ruling on a motion for judgment as a matter of law "'[o]ur power of review continues to be limited by the Seventh Amendment....'") (quoting *Lust v. Clark Equipment Co., Inc.*, 792 F.2d 436, 437 (CA4 1986)); *generally, Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211 (1996) (analyzing the permissibility of appellate review of jury verdicts in light of Seventh Amendment jury trial guarantee).

The Seventh Amendment guarantees that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amdt., VII (App. 76). Where judgment as a matter of law would infringe upon the province of the jury as provided for in the Seventh Amendment, it is inappropriate. *See id.* In such a case, the proper remedy is for the lower court to grant a new trial on the issue of damages. *Bereda*, 865 F.2d at 55; *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1548 (CA5 1984). Or, if this Court prefers, it may simply reinstate the jury verdict. *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 650 (1969). *See* I.B., page 18.

A. The district court had no alternative upon finding possible error in the lost profits calculation but to grant a new trial limited to the issue of damages.

The plain language and historical interpretation of the Seventh Amendment disallow judgment as a matter of law where the alleged error is insufficient to dismiss the claim as a whole. Additionally, federal circuit courts have held that, in cases where a jury returns a general verdict for damages (including lost profits damages) based in part upon expert testimony, if the district court finds error in the calculation of those damages, the proper remedy is not judgment as a matter of law, but rather is a new trial limited to the issue of damages. *Bereda*, 865 F.2d at 55; *Nissho-Iwai*, 729 F.2d at 1548. Finally, this Court has held that granting a new trial solely on the issue of damages does not offend the Seventh Amendment. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 499 (1931). Thus, the district court in the present case erred in granting judgment as a matter of law. If the district court was correct in deciding that the damages figure was reached erroneously, then a new trial limited to the damages issue should be granted.

1. The historical interpretation and traditional understanding of the Seventh Amendment disallow judgment as a matter of law where the alleged error is insufficient to dismiss the claim as a whole.

The Seventh Amendment, adopted in 1791, provides that, "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amdt. VII. At common law in 1791, a judgment on a verdict could be either suspended by granting a new trial, or, less commonly, arrested by setting it

aside upon matters of law. 3 William Blackstone, Commentaries *387, *393. According to Blackstone it is "an invariable rule with regard to arrests of judgment upon matters of law, 'that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the action or plea.'" *Id.* at *393-94.

Judgment as a matter of law (or judgment *non obstante veredicto*) was a mid-eighteenth century outgrowth of the "older and rather obscure motion in arrest of judgment." Edith Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 316 (1966). As with motions in arrest of judgment, judgment as a matter of law "lay only when the defense or matter or rejoinder pleaded was deficient at law – so that a demurrer could have been proper – but when the case had nevertheless been allowed to go to the jury." *Id.*

Thus, while judgment as a matter of law is a proper procedure under the Seventh Amendment, its application is limited by the language and the historical interpretation of the Amendment. In the present case, the grant of judgment as a matter of law exceeded constitutional limits. Plainly, AT&T could not have moved successfully to dismiss COT's claim, much less the subpart dealing with lost profits, on speculation that COT might not put on sufficient evidence at trial to support it. Furthermore, the error found in the present case was evidentiary, and at common law in 1791 the only post-verdict remedy available where the issue was evidentiary was a new trial. *Id.* at 311-12. Therefore, the grant of judgment as a matter of law in the present case was unconstitutional.

2. ***Precedent indicates that where there is a general jury verdict, a district court that finds possible error in the calculation of lost profits has no alternative but to grant a new trial on the issue of damages.***

In *Bereda*, a Title VII sex and age discrimination case, the district court erred in failing to instruct the jury that only two years of back pay damages were allowable under Title VII. 865 F.2d at 53. The Third Circuit Court of Appeals surmised that because of this error the jury award of $55,000 may have reflected seven years (the period suggested by plaintiff at trial) of back pay damages. *Id.* at 51, 53. This notion was strongly supported by the fact that the award appeared to be based on plaintiff's expert's damages differential figure, as described at trial, multiplied out over seven years. *Id.* at 54.

The appellate court admitted that it was "tempted simply to reduce the award to reflect" the proper time period, using the same differential figure that the jury presumably used. *Id.* The court rejected such a solution as improper, however, and emphasized that "[i]n the absence of a special verdict on this point... we cannot be sure how the jury evaluated the damage evidence or how it arrived at its verdict." *Id.* at 55.

In a footnote, the court laid out possible alternative ways by which the jury might have reached its conclusion. *Id.* at n. 4. Because these possibilities existed, comparatively remote though they may have been, the court held that "[r]ather than recalculating the award to reflect our intuition as to how the jury arrived at its verdict, the proper procedure is to remand for a new trial on the issue of damages." *Id.* at 55.

In the present case, the jury returned a general verdict awarding COT $13 million. App. 78. There were a number of possible ways the jury may reasonably have come to settle on

this award, especially where COT presented evidence at trial that its compensatory damages amounted to $14.5 million. App. 43. For instance, the jury could have simply cut off COT's lost profit damages in 1998, when COT's renewed contract with AT&T would have expired; or the jury could have discounted COT's $14.5 million damages claim based on other factors that it did not believe COT accounted for in its calculations; and so forth.

In spite of the unknowable process underlying the general verdict, and in spite of the Third Circuit's holding in *Bereda* that courts must resist the temptation in such a situation to intuit as to that process in order to justify an alteration of the jury verdict, the district court in the present case (with the subsequent sanction of the Ninth Circuit) ordered a reduction of over 90% of the jury's award based on its guess as to how the jury calculated and decided upon that award. App. 52-53, 65]. As in *Bereda*, this action derived from the determination that the judge had erred in what he allowed the jury to consider. Also like *Bereda*, this action went beyond the acceptable parameters of judgment as a matter of law, and intruded upon the province of the jury in violation of the Seventh Amendment.

The Fifth Circuit Court of Appeals has also held that Seventh Amendment concerns may act as a constraint on judicial alteration of a jury award, and it did so within the context of a lost profits claim. *See Nissho-Iwai*, 729 F.2d 1530 (CA5 1984). In *Nissho-Iwai*, the jury in a breach of contract case awarded the plaintiff over $7 million in damages. *Id.* at 1537. On review, the appellate court found that the verdict was improper to the extent that it included lost profits between October 1, 1976 and March 31, 1977, a period during which the parties had agreed to suspend performance obligations. *Id.* at 1547.

The court noted, however, that the general verdict did not identify the specific considerations that went into the sum. *Id.* The court further noted that the sum differed from plaintiff's own proof. *Id.* Based on these factors, the court concluded that it had no alternative but to remand for a new trial limited to the issue of the proper measurement of damages. *Id.* at 1548. The court also concluded that at the new trial, plaintiff could attempt to prove that there was in fact no suspension of obligations. *Id.* at n. 29. This could be done despite the fact that the record as it stood before the court supported only a finding that there was a suspension, since, the court acknowledged, "it is conceivable that there is some evidence not previously introduced that disproves the suspension." *Id.*

In the present case, the general verdict did not identify the specific considerations that went into the sum chosen by the jury. App. 78. Additionally, that sum differed from the $14.5 million sum that COT's expert testified to at trial. App. 42-43. Therefore, the court had no alternative upon finding possible error in the lost profits calculation but to grant COT a new trial on damages. Moreover, on re-trial COT should be permitted to present new evidence as to the existence and extent of those lost profits.

There is no question but that judgment as a matter of law, properly executed in an effort to further the policy concerns from which it is derived, does not conflict with the Constitution. But the Constitution still governs, and limits, application of judgment as a matter of law. In this case, the verdict does not clearly indicate how it was arrived at or what it contemplates. Consequently, the court is precluded by the Seventh Amendment from reducing the jury verdict by virtue of a judgment as a matter of law based on the court's intuition as to how the jury award was reached.

Additionally, in the present case there is no indication that judgment as a matter of law would serve to protect neutral principles of law from powerful forces such as compassion and prejudice. And while sanctioning grants of judgment as a matter of law based on judicial speculation as to jury considerations would undoubtedly conserve court time, that policy goal is far outweighed by the competing and superior policy goal embodied in the Seventh Amendment.

The purpose and importance of the Seventh Amendment has been expressed as follows: "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). Courts have honored this ideal by consistently and uniformly deferring to the jury the right to make factual determinations such as the one at issue in this case. No court's decision to reduce a jury verdict on damages has ever been allowed to stand, unless it was a remittitur accompanied by the right to opt for a new trial, or a judgment as a matter of law pertaining to a discernibly separate and distinct issue or award. The course of action taken in the present case by the district court post-trial and affirmed by the Ninth Circuit court is unprecedented and, moreover, unconstitutional. A new trial on the issue of damages ought therefore to be granted.

3. *This Court has found that granting a new trial limited to the issue of damages is permissible where, as here, the issues of liability and damages are separate.*

This Court has held that granting a new trial solely on the issue of damages does not offend the Seventh Amendment.

Gasoline Products, 283 U.S. at 499; *see also* Fed. R. Civ. P. 59(a) (providing that a new trial may be granted on part of the issues). The practice must be limited, however, to cases where the issues of liability and damages are separate. *Gasoline Products*, 283 U.S. at 499

The policy arguments in favor of partial new trials have been summarized as follows: "Retrial of a properly decided liability issue, when error has tainted only the monetary damages issue, arguably works injustice upon the plaintiff who already has proven the claim adequately to the jury. [Additionally], a complete retrial wastes judicial time and resources and results in unnecessary delay." James A. Henderson, Jr. et al., *Optimal Issue Separation in Modern Products Liability Legislation*, 73 Tex. L. Rev. 1653, 1678 (1995) (citation to *Gasoline Products* omitted).

In the present case, because liability has already been found (App. 77-78, 64-65, 26) and because damages is an issue separate from liability, the interests of justice and judicial economy mandate that if there be a new trial, it ought to be limited to the issue of damages.

Gasoline Products involved a complicated and uncertain record as to the nature and extent of several oral and written contracts. The appellate court reversed a jury verdict in favor of petitioner, Gasoline Products Co., due to errors in the charge of the trial court with respect to the measure of damages. *Id.* at 496. The case was remanded for a new trial limited to the issue of damages. *Id.*

In considering the limitation on the new trial as ordered by the appellate court, this Court announced that "the Seventh Amendment... does not require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another

distinct issue, because erroneously determined, must again be passed on by a jury." *Id.* at 498. However, the Court found that because the new jury would have to be informed of a number of particulars regarding the contracts themselves in order to pass on the claim for loss of profits, a new trial should have been ordered on all issues. *Id.* at 499-500. The Court concluded that "the question of damages... is so interwoven with that of liability" that the two could not be separated. *Id.* at 500-501.

The present case is clearly distinguishable from *Gasoline Products*. None of the nine "concerns" expressed by the trial judge in his opinion granting judgment as a matter of law (App. 54-60) raised questions concerning the original contracts themselves, which was the overriding concern of the *Gasoline Products* Court. In fact, both the district court (App. 64-65) and the Ninth Circuit Court of Appeals (App. 26) agreed with the jury that AT&T was liable for breach of contract.

Moreover, the jury found AT&T liable not only for willful misconduct with regard to contract (App. 79-80, 77), but also for intentional interference with contract. App. 77. In his opinion for the amended judgment, the trial court judge affirmed the jury's finding of liability on the intentional interference claim. App. 65. He even went so far as to express his satisfaction with the liability finding in recommending that "[i]f an appellate court concludes that I erred in granting in part AT&T's motion for judgment as a matter of law, the $13,000,000 jury verdict should stand." App. 48. The Ninth Circuit Court of Appeals also recognized that COT prevailed on its claim for tortious interference with contract, and therefore remanded this case for a new trial on the issue of punitive damages. App. 26. Regardless of any questions as to contract, the issue of liability remains settled due to the uniform finding that there was intentional interference with contract on the part of AT&T.

In summary, both courts allowed for the award of damages on both claims, indicating that the liability issue had been correctly determined. The only question that concerned those courts was how much the damages award should be. That question is not so interwoven with the properly resolved liability question that the two cannot be separated. Rather, the issues of damages and liability are distinct, such that if there was indeed error in the jury's determination of damages, that issue may be retried separately.

The case law confirms that in a case such as this it is entirely proper and consistent with sound policy to order a new trial limited to the issue of damages. In *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1480 (CA10 1985), the court found that the jury had erred on the issue of damages in a complex contract case. The court noted, however, that "[t]he confusion concerning the proper measure of damages... did not affect the determination of liability." *Id.* Thus, the court held that "the interests of justice require a new trial as to the proper amount of damages." *Id.*

In *Center Chemical Co. v. Avril, Inc.*, 392 F.2d 289, 291 (CA5 1968), the appellate court found that there had been insufficient proof to support the jury's award of lost profits damages due to breach of contract. The court noted that "[d]amages in [future lost profits cases] like this are inherently difficult of proof, [but this] is not to say that damages would be impossible of proof." *Id.* Stating that there was clear evidence that the contract had been breached, the court remanded the case for a trial solely on damages. *Id.*

In *Hadra v. Herman Blum Consulting Engineers*, 632 F.2d 1242, 1245-46 (CA5 1980), the appellate court found that *Gasoline Products* did not require a new trial on all issues where the case involved a tort claim of wrongful discharge. The court

held that the evidence was insufficient to support the jury's damages award, but that it *was* sufficient to support the liability finding. *Id.* Thus the court affirmed the lower court's order for a new trial limited to damages. *Id.* at 1246-47.

These cases clearly illustrate that the primary holding of *Gasoline Products* (that a correctiy determined issue need not be tried again) is not made inapplicable by the mere fact that a case involves complex contracts and lost profits damages. *Firestone*, 769 F.2d at 1480; *Center Chemical*, 392 F.2d at 291. Even if it was, where there is a properly resolved tort claim the issue of liability remains settled, and a new trial limited to damages is appropriate. *Hadra*, 632 F.2d at 1246. There are many other cases standing for the same or a similar proposition as these cases. *See* Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* §2814 at 150 (stating that "[p]erhaps the most common example [of circumstances under which partial new trial has been found a proper remedy] is the grant of a new trial limited to damages when liability has been properly determined," and listing nearly three full pages of annotations.)

In the present case, the liability issue has been properly determined, as the lower courts' opinions indicate. There is no need for a new trial on all issues. Even if it were found that all breach of contract cases are automatically ineligible for partial trial treatment, partial trial would still be proper in the present case because there is a correctly resolved tortious interference claim as well. Therefore, in accordance with *Gasoline Products* and its progeny, and in the interests of justice and judicial economy, a grant of a new trial should be restricted to the issue of damages.

B. In the alternative, this Court may decide to reinstate the jury's verdict.

While the district court, upon finding error, had no other option but to grant a new trial on the issue of damages, this Court does have another option: it may reinstate the jury's verdict. In *Perkins v. Standard Oil Company of California*, 395 U.S. at 650 (1969), the Court did so, having determined that there was no need to prolong the litigation any further.

This Court would be justified in taking a similar course of action with this case. In this case, the trial court found the damages evidence presented by COT's expert witness to be sufficiently well-grounded up until 1992, when COT was forced to quit the contract due to the willful misconduct and intentional interference of AT&T. App. 60-61. It does not make sense that evidence and methods deemed acceptable up until a certain point should suddenly become unacceptable because the conduct that brings about the damages has reached critical mass. Rather, as in the rule in Oregon and generally, AT&T should have been held liable for the reasonably foreseeable consequences of its wrongful acts. *VonRavensberg v. Houck-Carrow Corp.*, 60 Or. App. 412, 653 P.2d. 1297 (1982); 45 Am. Jur. 2d *Interference* § 57 (1969).

Moreover, as previously noted, the trial court judge himself conceded that "[i]f an appellate court concludes that I erred in granting in part AT&T's motion for judgment as a matter of law, the $13,000,000 jury verdict should stand." App. 48. Because the trial judge did err by granting judgment as a matter of law in violation of the Seventh Amendment (and on the basis of a truncated record, *infra* part II) this Court may find it appropriate to conserve judicial resources by simply reinstating the properly arrived at 1994 jury verdict. *See also Montgomery Ward*, 311 U.S. at 250 (noting that the very

purpose of allowing decision on a motion for directed verdict to be postponed until after a verdict has been returned is to speed litigation and prevent unnecessary retrials).

II. A COURT SHOULD NOT BE PERMITTED TO ENTER JUDGMENT AS MATTER OF LAW BASED ON A POST-TRIAL TRUNCATED RECORD, SINCE DOING SO UNFAIRLY TAKES ADVANTAGE OF A PARTY'S JUSTIFIABLE RELIANCE.

It is a well established rule that a motion for judgment as a matter of law does not raise questions relating to admissibility of evidence. *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358 (CA8 1973) (quoting *Townsend v. United States Rubber Co.*, 74 N.M. 206, 209, 392 P.2d 404, 406 (1964) *overruled on other grounds by Rhein v. ADT Automotive, Inc.*, 930 P.2d 783, 789 n. 3, 122 N.M. 646 (1996)); *Douglas v. Eaton Corp.*, 956 F.2d 1339, 1344 (CA6 1992) (quoting *Townsend*). This rule is necessary to prevent a party from suffering unfair reliance and prejudice where the court admits that party's evidence at trial, but later determines the evidence should not have been admitted and accordingly truncates the record. *Midcontinent*, 471 F.2d at 359; *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 696 (CA11 1993). Judgment as a matter of law based on the truncated record would deny the party any opportunity to introduce additional evidence. *Jackson*, 980 F.2d at 696. Therefore, it has been determined that the proper procedure in such a situation is to grant a new trial on the issue of damages. *Persinger v. Norfolk & Western Ry. Co.*, 920 F.2d 1185, 1189 (CA4 1990).

The trial court erred when it considered the admissibility of the testimony by COT's expert in ruling on AT&T's motion for judgment as a matter of law. *See, e.g.,*

Midcontinent, 471 F.2d at 357. COT relied on the initial determination that the evidence was admissible, and COT was unfairly prejudiced when it was denied the opportunity to introduce additional evidence as a result of the court's grant of judgment as a matter of law. The court should have granted a new trial on the issue of damages.

A. It was error for the District Court to enter judgment as a matter of law based on the admissibility of COT's expert testimony.

Prior to the Ninth Circuit's decision in the present case, every circuit that had ruled on the question of whether a trial court may enter judgment as a matter of law on the basis of a truncated record had answered in the negative. This includes the Eighth Circuit (*Midcontinent*, 471 F.2d at 359), the Eleventh (*Jackson*, 980 F.2d at 696), the Sixth (*Douglas*, 956 F.2d at 1344), the Fourth (*Persinger*, 920 F.2d at 1189), and the Fifth (*Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (CA5 1985)). Because the Ninth Circuit failed to logically differentiate these cases and the legal principles upon which they rest from the present case, the courts of the Ninth Circuit should be brought into conformity with those of the other circuits in being prohibited from granting judgment as a matter of law on the basis of a truncated record.

1. The Eighth Circuit properly stated the applicable rule in this context, and logically concluded that it prohibits granting judgment as a matter of law on the basis of a truncated record.

The Eighth Circuit was the first circuit to rule directly on the permissibility of granting judgment as a matter of law on the basis of a truncated record. *Midcontinent*, 471 F.2d at 359. In *Midcontinent*, plaintiff's broadcasting station was destroyed

by defendant's airplane. *Id* at 358. After the parties stipulated to the amount of damages, the existence and amount of lost profits was the sole issue remaining at trial. Plaintiff relied almost exclusively upon the expert testimony of one witness to prove lost profits. The trial court admitted the testimony over defendant's objection that plaintiff had not established an adequate factual foundation for the testimony. After the jury awarded the plaintiff $500,000, however, the court reversed itself, deciding that it was mistaken in admitting the expert testimony. Judgment as a matter of law was entered. *Id.*

On appeal, the court for the Eighth Circuit stated the general rule that a motion for judgment as a matter of law does not raise questions relating to admissibility of evidence. *Id.* (quoting *Townsend*, 74 N.M. at 209, 392 P.2d at 406). Instead, in considering such a motion the evidence must be taken as it existed at the close of trial. *Id.* at 359. Applying this rule to the case before them, the court determined that it "had no alternative but to grant a new trial rather than [judgment as a matter of law]." *Id.* (quoting *Townsend*, 74 N.M. at 210, 392 P.2d at 407, *overruled by Rhein,*, 930 P.2d at 789-90 nn. 3 and 4, 122 N.M. 646 (1996) (holding that where a lower court grants judgment as a matter of law based on the evidence or credibility of witnesses, new trial is an improper remedy; the proper remedy is reinstatement of the jury verdict).

In the present case, the issue of lost profits is similarly in issue. Like the plaintiff in *Midcontinent*, COT relied primarily on one expert's testimony to establish the extent of those lost profits. App. 42. The district court admitted the testimony over AT&T's objection during the course of the trial (App. 53), and the jury awarded COT damages. The district court then decided that it "should have stricken this evidence" and entered judgment as a matter of law. App. 61, 62. In light of the rule stated in *Midcontinent*, this was error.

The Ninth Circuit Court of Appeals also erred in allowing the judgment as a matter of law to stand. The court acknowledged the basic rule of *Midcontinent*, stating that "it is true... that a trial judge must consider all the evidence submitted in ruling on a motion for judgment as a matter of law." *Central Office Tel. v. American Tel. and Tel. Co.*, 108 F.3d 981, 993 (CA9 1997). The appellate court claimed, however, that the district court had satisfied this requirement since it had "considered the entirety of the testimony of COT's expert, found that he should not have allowed the post-contract period evidence to be submitted, then reduced the jury's damage award." *Id.*

Such a sequence is explicitly disallowed by *Midcontinent*, as well as by the other cases discussed herein. These cases do not require merely that the trial court initially consider the evidence as a whole, after which it is free to pass on the admissibility of that evidence and ultimately render a judgment as a matter of law if it finds that the evidence "should not have [been] allowed." If this was all that was required, the rule stated in *Midcontinent* and restated by the Ninth Circuit would be reduced to nothing.

Rather, these cases hold that a motion for judgment as a matter of law *at no time* raises questions relating to admissibility. *See, e.g., Midcontinent*, 471 F.2d at 357. Only then does it make any sense to have the rule at all. Thus, the district court judge was in error when, in considering defendant's motion for judgment as a matter of law, he allowed his determination "that he should not have allowed the post-contract period evidence to be submitted" to play a role in his ruling. App. 24.

In the present case, the Ninth Circuit explicitly recognized both the general rule that underlies the prohibition

against granting judgment as a matter of law based on a truncated record, and the fact that the district court engaged in such prohibited action. App. 24. Logic and authority mandate that the Ninth Circuit should therefore have found the actions of the district court impermissible. Its failure to do so places the Ninth Circuit in stark opposition to sister circuits.

2. Other circuits (excluding the Ninth) have been in accord with the ruling of the Eighth Circuit.

Since *Midcontinent*, four other circuits have reached the same logical conclusion as the Eighth Circuit, finding that judgment as a matter of law may not properly be entered on the basis of a truncated record. *See, e.g., Jackson*, 980 F.2d at 696 (CA11); *Douglas*, 956 F.2d at 1344 (CA6); *Persinger*, 920 F.2d at 1189 (CA4); *Dixon*, 754 F.2d at 580 (CA5). Only the Ninth Circuit has reached a different conclusion.

While the specific facts of the cited cases differ, they all share certain elements. Each involved the admission at trial of key evidence which the judge determined post-trial should not have been admitted, and in three out of the four cases the evidence in question was expert testimony. In each, the jury awarded damages, and the judge reduced those damages by granting judgment as a matter of law. And in each, the reviewing circuit court found that the district court judge was in error because he had violated the rule that judgment as a matter of law may not be entered on the basis of a truncated record.

In the present case, the pertinent elements are all present, except for the holding. At trial, the district court admitted the testimony of COT's expert. App. 42-43. Post trial, the court determined that it should have stricken that testimony, and accordingly reduced the jury award via judgment as a matter of law. App. 62, 65. On appeal, the Ninth Circuit

began by accepting the same premise as the other circuits (that a judge must consider all admitted evidence in ruling on a motion for judgment as a matter of law), but nonetheless reached a different result. App. 24.

The court's attempt to justify that different result is flawed. The Ninth Circuit held that a trial judge could fulfill his duty to consider all the evidence by considering it in the first instance, then deciding that he should never have considered it at all. App. 24. On the basis of that decision, he would then be free to enter judgment as a matter of law. App. 24. Clearly, were this approach adopted, the decisions from all the other circuits regarding this issue would be incorrect. After all, there can hardly be any doubt that the trial judges in those cases (and in any imaginable case) first considered all the evidence before deciding to strike some portion of it.

This Ninth Circuit approach should be rejected, as it turns the rule upon which it supposedly rests into nothing more than a decorative string of words that ultimately serves no purpose. The five other circuits that have considered this issue have adopted the more logical approach, an approach that shows proper deference to the rule of law.

B. Fairness demands that COT be granted a new trial on the issue of damages.

While legal rules are important, they must be clearly justifiable in terms of purpose and policy to be deserving of deference. The rule that judgment as a matter of law should not be entered on the basis of a truncated record is such a rule. It serves to ensure that all parties receive a fair trial, and that no party should be unfairly prejudiced where avoidable. In the present case, COT has been unfairly prejudiced as a result of the failure of the courts to properly implement and abide by the above stated rule.

All of the circuits that have ruled on this issue (save the Ninth) have cited policy reasons that support their decision. In *Midcontinent*, the Eighth Circuit explained that when a trial court admits a party's expert testimony, then post-trial determines that the evidence should have been stricken, that party is put in a position of unfair reliance. *Midcontinent*, 471 F.2d at 359. That reliance stems from the party's properly held belief that its evidence is admissible, and that further foundation or other evidence on the issue is unnecessary. *Id.*

In *Douglas*, the Sixth Circuit cited to *Midcontinent* and quoted it concerning the concept of "unfair reliance" in supporting its own conclusion that "it is wholly improper for a district judge to ignore evidence admitted at trial from its consideration in granting [judgment as a matter of law]." *Douglas,* 956 F.2d at 1343-44. The Fifth Circuit also quoted and expressed agreement with *Midcontinent* in *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (CA5 1983).

In *Persinger*, the Fourth Circuit held that there was reliance even where the district judge had expressed "great doubts" about the admissibility of a witness's expert testimony but had declared that, "I have let it in and I am not going to strike it at this time." *Persinger,* 920 F.2d at 1187, 1189. Furthermore, the appellate court held that the district judge's post-trial determination of inadmissibility "clearly prejudiced" the plaintiff since it left him "no opportunity to present additional evidence." *Id.* at 1189.

Finally, in *Jackson*, the Eleventh Circuit also noted the fact of reliance, and that it denies the relying party the opportunity to introduce new evidence. *Jackson*, 980 F.2d at 696. Moreover, the court stated that reliance was particularly great where the defense objected on several occasions to the

admission of the testimony and the district court ruled in plaintiff's favor each time during the trial. *Id.*

In the present case, COT relied heavily on the testimony of its expert, Mr. Hainline, to establish the existence and extent of lost profits. Although the district court noted that "AT&T moved to strike Hainline's damages analysis on a number of grounds," the court admitted the testimony during the trial. App. 53. COT's justifiable reliance was still further induced when COT's counsel offered to support Mr. Hainline's expert testimony by calling another witness, but was made to believe it unnecessary by the district court's ruling at trial that COT's damages analysis was admissible even without this additional testimony. App. 81-86. Moreover, even after trial the court found that Hainline's analytical methods were acceptable, at least through 1992 when COT was driven to quit the contract by AT&T's willful misconduct and intentional interference. App. 61.

The district court's post-trial conclusion that "Hainline is not an expert in the complex field of communications technology" (App. 52-53) and the resulting grant of judgment as a matter of law reducing much of the damages award came too late for COT to remedy through the introduction of new evidence. Therefore, judgment as a matter of law is inappropriate in the present case.

The appropriate remedy is a new trial. Only a new trial will allow COT the opportunity to introduce new and/or different evidence on the issue of damages. The conclusion of the Tenth Circuit in *Firestone* is appropriate here. 769 F.2d at 1480. In that case (involving a damages claim for breach of contract spanning sixteen years), the court held: "In view of the complexity of the damages evidence and the difficulty of proof, we believe that the interests of justice require a new trial as to

the proper amount of damages, rather than [judgment as a matter of law]." *Id.*

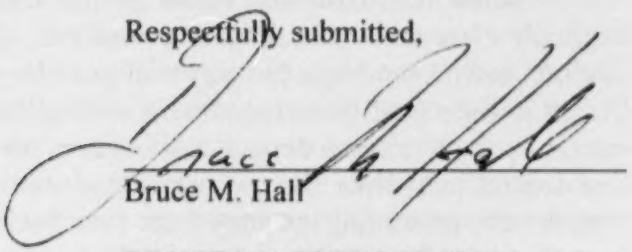
While not explicitly stated in the cases cited, it is implicitly clear that again the policy concerns embodied in the Seventh Amendment right to a jury trial loom large. If the Ninth Circuit is right (and the other circuits wrong) that a court may induce a party's reliance through admission of his evidence, then turn around and strike that evidence from consideration post-trial, thereby preventing the party from ever making his case to a jury, then the Seventh Amendment will have suffered a fatal blow. The Seventh Amendment is the protector of the right to trial by jury: and it is this court which must, in turn, protect the Seventh Amendment.

The rule that all evidence must be considered in ruling on a motion for judgment as a matter of law, and the policy of fairness that both supports and is supported by this rule, mandate that the grant of judgment as a matter of law be reversed in the present case. In its place, a new trial should be ordered, or, if this Court prefers, it may put an end to this litigation and simply reinstate the original jury verdict. *See supra,* part I.B at 12.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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